No. 87-1823

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MEN'S INTERNATIONAL PROFESSIONAL TENNIS COUNCIL, M. MARSHALL HAPPER III AND PHILIPPE CHATRIER,

Petitioners,

v.

VOLVO NORTH AMERICA CORPORATION, INTERNATIONAL MERCHANDISING CORPORATION AND PROSERV, INC.,

Respondents.

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

Petitioners respectfully submit this reply brief in response to the briefs of respondents in opposition and in further support of their petition for a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit, dated February 8, 1988, which denied petitioners' motion to dismiss respondents' appeals on jurisdictional grounds. *Volvo North America Corp.* v. *Men's International Professional Tennis Council*, 839 F.2d 69 (2d Cir. 1988). In that decision, the Second Circuit effectively held that interlocutory appellate jurisdiction is available to review every non-final order dismissing a claim which incidentally requests permanent injunctive relief, regardless of whether special harm is shown. The Second Circuit's holding conflicts with decisions of other circuit courts properly interpreting *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 84 (1981), to permit appellate jurisdiction under 28 U.S.C. § 1292(a)(1) over non-final orders that have the practical effect of granting or denying injunctions *only* if

they also have "serious, perhaps irreparable, consequence" and "can be effectually challenged only by immediate appeal." *See also Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, — U.S. —, 108 S. Ct. 1133, 1143 (1988); *Stringfellow* v. *Concerned Neighbors in Action*, — U.S. —, 107 S. Ct. 1177, 1184 (1987).

ARGUMENT

The central contention of respondents' briefs is that the Second Circuit applied the *Carson* test and merely made a factual determination of serious, irreparable harm. However, it is clear from the Second Circuit's decision that it found the *Carson* requirement of a special showing of serious, irreparable harm entirely dispensable to its exercise of appellate jurisdiction. In misplaced reliance on *General Electric Co.* v. *Marvel Rare Metals Co.*, 287 U.S. 430 (1932), the Second Circuit held that interlocutory review is available whenever an order of the district court has "entirely disposed of [a] prayer for injunctive relief." *Volvo*, 839 F.2d at 75. To the extent that the Second Circuit addressed any allegations of harm peculiar to the present case, it did so purely as an afterthought, to "fortify" an independent holding on the law that squarely conflicts with the decisions of the Federal, First and Third Circuits. *Id.* at 76; *see Woodard* v. *Sage Products, Inc.*, 818 F.2d 841, 852-53 (Fed. Cir. 1987) (en banc) (pointing out "the fallacy in accepting as a truism that orders deemed to deny permanent injunctions, as a class, inherently have serious *pendente lite* effect"); *Shirey* v. *Bensalem Township*, 663 F.2d 472, 477 (3d Cir. 1981) ("Congress did not contemplate that § 1292(a)(1) would be utilized as a generally available route to interlocutory appeals merely because the complaint happens to request injunctive

relief"); *Plymouth County Nuclear Information Committee, Inc.* v. *Boston Edison Co.*, 655 F.2d 15, 19 (1st Cir. 1981) (the denial of permanent injunctive relief "may be 'effectually challenged' on appeal from final judgment").

Contrary to respondents' contentions, petitioners have never "conceded" or "recognized" that their petition simply seeks review of an appellate court's factual determination. Indeed, the brief of respondent Volvo North America Corporation ("Volvo") quotes petitioners as having argued before the Second Circuit that this petition does *not* challenge any factual determination. Brief of Volvo at 16. The Second Circuit could not have rested its assertion of appellate jurisdiction on a factual determination because respondents failed to develop a record of harm in the district court.[1]

Respondents also contend that even if the Second Circuit misinterpreted or failed to apply the *Carson* requirement of serious, irreparable harm in the present case, it corrected itself in a later decision. *See Chasser* v. *Achille Lauro Lines*, Nos. 87-9081, 87-9083, 87-9085, 87-9087, 87-9089, 87-9091, slip op. (2d Cir. April 7, 1988). That decision, however, simply declined to permit appellate jurisdiction under the collateral order doctrine and in *dicta* noted that appellate jurisdiction would not lie under section 1292 (a)(1) because the denial of a motion to dismiss on forum-

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[1] Nevertheless, insight into the Second Circuit's expansive view of its powers of review can be gained from its *dicta* discussing respondents' supplementation of the record on appeal with affidavits on harm. In that *dicta*, the Second Circuit apparently resolved disputed factual issues by these affidavits which incorporated new material never presented to the district court, disregarding the district court's refusal to find that "there was no just reason for delay" pursuant to Fed. R. Civ. P. 54(b). *See Volvo*, 839 F.2d at 76. The Second Circuit's exercise in fact finding, not the outcome of that exercise, by itself constitutes a legal error susceptible of review by the Supreme Court.

selection grounds was not the equivalent of the denial of an injunction. Nowhere has the Second Circuit renounced its erroneous interpretation of *Carson* permitting interlocutory review whenever a claim seeking ultimate injunctive relief is dismissed.

Ironically, respondents argue that the interlocutory nature of the instant petition requires its denial, based on the congressional policy against piecemeal review. This policy, however, did not dissuade respondents from pursuing their own interlocutory appeals now pending in the Second Circuit. According to respondents, Supreme Court review of the Second Circuit's erroneous assertion of jurisdiction should be delayed because it would render moot any decision by the Second Circuit on the merits of respondents' appeals. It is for precisely this reason that the petition for a writ of certiorari is timely: the sooner the Second Circuit is informed that it does not have the power to hear respondents' appeals, the less time and effort will have been wasted.

CONCLUSION

Despite respondents' efforts to minimize the import of the Second Circuit's decision, it will have far-reaching impact on the availability of interlocutory review and the pleading tactics of litigants within the Second Circuit. Contrary to the congressional preference for finality, and in conflict with those circuits which have properly interpreted *Carson* v. *American Brands, Inc.*, the Second Circuit rule permits every litigant, merely by inserting into its pleading a request for permanent injunctive relief, to ensure that, if dismissed, its claims will obtain interlocutory review. Petitioners submit that such a radical expansion of appellate jurisdiction should be passed upon by this Court.

Dated: New York, New York
June 10, 1988

Respectfully submitted,

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